

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BENSON MILLS, INC.,

Plaintiff,

vs.

KENNETH FORTENBERRY, JOHN
DOES NO. 1-10,

Defendants.

CIVIL ACTION No. 2:23-cv-00686

**COMPLAINT FOR (1)
FRAUDULENT DMCA NOTICES
UNDER 17 U.S.C. § 512(f); (2)
BUSINESS DEFAMATION; (3)
VIOLATION OF THE
WASHINGTON CONSUMER
PROTECTION ACT, RCW
19.86.020; and (4) COMMON LAW
UNFAIR COMPETITION**

JURY DEMAND

COMPLAINT

Plaintiff, Benson Mills, Inc. (“Benson Mills”), by its attorneys, Dorsey & Whitney LLP, hereby files this action against Defendant Kenneth Fortenberry (“Fortenberry”) and John Does No. 1-10 (with Fortenberry, “Defendants”), and alleges as follows:

PARTIES

1. Plaintiff Benson Mills is a privately held corporation organized under the laws of the State of New York, with its principal place of business located at 230 5th Ave, Suite 609, New York, NY 10001. Benson Mills is the owner of copyrighted works that are at issue in this action.

2. The location and citizenship of defendant Fortenberry is unknown to Benson Mills. Indeed, whether “Kenneth Fortenberry” is merely an alias for another person or group of persons is also unknown to Benson Mills.

3. Doe Defendants 1-10 are persons whose true identities are unknown to Benson Mills, but who have, upon information and belief, acted in concert with Fortenberry.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, in that Benson Mills asserts a claim under federal law for violation of Section 512(f) of the Digital Millennium Copyright Act, and supplemental jurisdiction over Benson Mills’ state law claims under 28 U.S.C. § 1367(a).

5. This Court has personal jurisdiction over Fortenberry and the Doe Defendants pursuant to RCW 4.28.185, the Washington Long-Arm Statute, because Defendants committed tortious acts that have caused Benson Mills injury in the State of Washington.

1 6. Venue is proper under 28 U.S.C. § 1391(b)(2), in that a substantial part of
2 the events or omissions giving rise to the claims occurred in this judicial district and
3 Defendants have harmed Benson Mills in this judicial district, or, in the alternative, 28 U.S.C.
4 § 1391(b)(3), in that if venue is not proper under 28 U.S.C. § 1391(b)(2), there is no
5 known judicial district in which venue would otherwise be proper under Section 1391(b).
6

7 **FACTUAL BACKGROUND**

8 7. Benson Mills is one of the leading suppliers of table linens, placemats and other
9 home textiles in the United States. Many of Benson Mills' goods incorporate original designs
10 that have been created over time by Benson Mills employees and as to which Benson Mills owns
11 the copyrights. Likewise, Benson Mills markets and advertises its goods using photographs
12 created or commissioned by Benson Mills and as to which Benson Mills also owns the
13 copyrights. Many of Benson Mills original designs have been registered with the U.S. Copyright
14 Office.
15

16 8. Many of the home textiles that Benson Mills sells are seasonal, as they
17 incorporate motifs and designs that are specific to various seasons or holidays, including
18 Christmas, Thanksgiving, Easter and Halloween, when American consumers gather together
19 with families and friends for celebrations at which Benson Mills products are intended for use.
20

21 9. Unfortunately, there are third parties that have sought to take unfair advantage of
22 Benson Mills' success by creating, distributing, selling, advertising and marketing directly
23 competitive products bearing or including designs that are identical or substantially similar to
24 those of Benson Mills, and that infringe copyrights owned by Benson Mills. Over time, Benson
25 Mills has initiated enforcement actions against such competitors, including by filing lawsuits for

1 copyright infringement in federal courts, and by filing “takedown” notices with the Amazon
2 ecommerce platform operated by Amazon.com, Inc. (“Amazon”), which is headquartered in this
3 District, under 17 U.S.C. § 512(c) of the Digital Millennium Copyright Act (the “DMCA”). The
4 Amazon ecommerce platform is one of the largest trade channels through which Benson Mills
5 home textiles are sold.

6
7 10. In recent months, it appears that one or more of the targets of Benson Mills’
8 enforcement activities has undertaken a retaliatory strategy of filing their own DMCA takedown
9 notices with Amazon against Benson Mills. All of these takedown notices were filed by or in the
10 name of defendant Fortenberry, and in them, Fortenberry has asserted claims that the designs of
11 Benson Mills products, and/or photographs used by Benson Mills to advertise such products,
12 infringe purported copyrights owned by Fortenberry.

13
14 11. However, the copyright claims Fortenberry has asserted in these takedown notices
15 are demonstrably false and fraudulent (the “Fraudulent Takedown Notices”). Among the
16 Fraudulent Takedown Notices were the following:

17 A. In early December 2022, Fortenberry filed 26 DMCA takedown notices against
18 Benson Mills’ photographs used in listings for its Clear Plastic tablecloth (ASIN B0006B46V2),
19 Holiday Legacy tablecloth (ASIN B079569KBZ) and Harvest Legacy tablecloth (ASIN
20 B0771SSJNZ). However, the designs for the Holiday Legacy and Harvest Legacy tablecloths
21 were registered on September 24, 2014, by Benson Mills with the U.S. Copyright Office under
22 Reg. Nos. VA 1-924-595 and VA 2-268-214, respectively, and the relevant photographs were
23 taken by a Benson Mills in-house photographer in September and November 2021 and March
24 2022, as evidenced by photo file details showing their dates of creation.
25

1 B. On March 31, 2023, Fortenberry filed DMCA takedown notices against Benson
2 Mills' copyrighted content and packaging in listings for its Blooming Bunnies Fabric tablecloth
3 (ASIN B07G4GGVZX). However, Benson Mills owns a U.S. copyright registration for its
4 Blooming Bunnies tablecloth, which was registered on January 27, 2023, with the U.S.
5 Copyright Office, Reg. No. VA 2-338-114.

6 C. On April 3, 2023, Fortenberry filed additional DMCA takedown notices against
7 Benson Mills' copyrighted photographs used in listings for its Easter Meadow tablecloth (ASIN
8 B09ZZ9723F). However, Benson Mills owns the copyright in these photographs, which were
9 taken by a Benson Mills in-house photographer in July 2022, as evidenced by photo file details
10 showing their dates of creation.

11 D. On April 3, 2023, Fortenberry filed additional DMCA takedown notices against
12 Benson Mills' copyrighted photographs used in listings for its Clear Vinyl tablecloth (ASIN
13 B0006B46V2). However, Benson Mills owns the copyright in these photographs, which were
14 taken by a Benson Mills in-house photographer in March and November 2022, as evidenced by
15 photo file details showing their dates of creation.

16 E. On April 3, 2023, Fortenberry filed additional DMCA takedown notices against
17 Benson Mills' copyrighted photographs used in other listings for its Easter Meadow tablecloth
18 (ASIN B09ZZKLG35). However, Benson Mills owns the copyright in these photographs, which
19 were taken by a Benson Mills in-house photographer in July and December 2020, as evidenced
20 by photo file details showing their dates of creation.

21 F. On April 3, 2023, Fortenberry filed additional DMCA takedown notices against
22 Benson Mills' Spring Tablecloth, Fabric Spillproof Indoor/Outdoor Easter and Spring Table
23 Cloth (Fiona) design (ASIN B07S41GWLS; ASIN B07G4HRF2F; ASIN B07G4GN54R).
24 However, once again, Benson Mills is the owner and creator of this design.
25

1 12. All of the Fraudulent Takedown Notices filed by or in the name of Fortenberry,
2 with the assistance of the Doe Defendants, were fraudulent, in that they falsely claimed
3 ownership in designs and photographs belonging to Benson Mills, in violation of 17 U.S.C.
4 § 512(c)(3), which requires that any DMCA takedown notice must be accompanied by
5 statements that: (i) the party filing the notice “has a good faith belief that use of the material in
6 the manner complained of is not authorized by the copyright owner, its agent, or the law”; and
7 (ii) “the information in the notification is accurate, and under penalty of perjury, that the
8 complaining party is authorized to act on behalf of the owner of an exclusive right that is
9 allegedly infringed.”
10

11 13. As if the filing of the Fraudulent Takedown Notices were not enough, Fortenberry
12 and the Doe Defendants also timed the false filings to inflict maximum damage on Benson Mills
13 during the Christmas and Easter selling seasons. Upon receipt of the Fraudulent Takedown
14 Notices, Amazon either disabled the product listings for the affected Benson Mills products, or
15 removed the photographs depicting the products, thereby substantially diminishing the likelihood
16 that consumers would buy them. Although Benson Mills, through the DMCA counter-
17 notification process set forth in 17 U.S.C. § 512(g), was able to have the affected listings and/or
18 photographs restored eventually, Benson Mills lost, upon information and belief, hundreds of
19 thousands of dollars in sales during critical holiday selling seasons while its listings were down
20 or while no photos were included.
21
22

23 14. Given the recurring pattern of behavior on the part of Fortenberry and the Doe
24 Defendants, Benson Mills is greatly concerned about future disruptions to its selling efforts that
25 focus on seasonal merchandise. The products affected by the Fraudulent Takedown Notices

1 were developed entirely from significant expenditures of time and money by Benson Mills,
2 based on its own efforts and not misappropriated from third parties. The abuse of the DMCA to
3 damage Benson Mills' business should not be permitted to continue.

4 15. Benson Mills has no adequate remedy at law.

5 **COUNT I**

6 **DMCA 512(f) – FRAUDULENT TAKEDOWN NOTICES**

7
8 16. Benson Mills repeats and realleges the allegations of the foregoing paragraphs of
9 this Complaint as though fully set forth herein.

10 17. Benson Mills is the owner of all of the product designs and photographs that were
11 the subject of the Fraudulent Takedown Notices, all of which were developed by Benson Mills
12 through its own efforts. None of the affected products or photographs infringe the rights of any
13 third party.

14
15 18. Notwithstanding, Defendants filed or caused to be filed with Amazon the
16 Fraudulent Takedown Notices, which were filed in violation of 17 U.S.C. § 512(c)(3) because
17 they falsely claimed ownership of Benson Mills' copyrighted product designs and photographs.

18 19. Upon information and belief, Defendants knew they had no right to submit the
19 Fraudulent Takedown Notices because the Benson Mills designs and photographs that were the
20 subject of the Fraudulent Takedown Notices were non-infringing.

21 20. The Fraudulent Takedown Notices were based on knowing and material
22 misrepresentations, in violation of 17 U.S.C. § 512(f).

23 21. As a result of Defendants' acts alleged herein, Benson Mills incurred costs and
24 expenses, including attorneys' fees, and has suffered, is suffering, and will continue to
25

1 suffer substantial damage to its business in the form of lost profits and injury to its goodwill and
2 reputation.

3 22. Benson Mills is thus entitled to damages in an amount to be proven at trial, plus
4 interest, and preliminary and permanent injunctive relief, together with the recovery of its
5 attorneys' fees incurred in connection with this proceeding.
6

7 **COUNT II**

8 **BUSINESS DEFAMATION**

9 23. Benson Mills repeats and realleges the allegations of the foregoing paragraphs of
10 this Complaint as though fully set forth herein.

11 24. Defendants' Fraudulent Takedown Notices communicated to Amazon included
12 the materially false claim that the product designs and images that were the subject of the
13 Notices were not authorized by the owner of the copyright in such designs and images; that
14 Defendants were authorized to act on behalf of the owner of such copyrights; and that such
15 product designs and images were infringing.
16

17 25. Defendants made such false claims with actual knowledge of their falsity.

18 26. Defendants made such false claims with the intent to harm Benson Mills' business
19 and reputation with Amazon.

20 27. This intentional and malicious conduct concerning Benson Mills' products
21 resulted in harm to Benson Mills' business reputation.
22

23 28. As a direct result of Defendant's defamatory statements, Benson Mills has
24 incurred, and continues to incur, damages in an amount to be proven at trial.
25

COUNT III

**VIOLATION OF THE WASHINGTON
CONSUMER PROTECTION ACT, RCW 19.86.020**

29. Benson Mills repeats and realleges the allegations of the foregoing paragraphs of this Complaint as though fully set forth herein.

30. Defendants have engaged in unfair and deceptive acts by filing the Fraudulent Takedown Notices with Amazon.

31. Defendants' practices occurred in trade or commerce.

32. As alleged in the Counts of this Complaint, Defendants' actions were unlawful.

33. Defendants' unlawful acts have damaged Benson Mills' business, reputation and sales by resulting in the removal of Benson Mills' product listings and photographs from the Amazon platform during critical holiday selling seasons.

34. Defendants' unfair and deceptive acts have directly and proximately caused Benson Mills to incur, and to continue incurring, damages.

35. As a result of the foregoing, Benson Mills is entitled to an award of damages in an amount to be proven at trial, and treble damages and attorneys' fees as allowed under the statute.

COUNT IV

UNFAIR COMPETITION UNDER WASHINGTON STATE COMMON LAW

36. Benson Mills repeats and realleges the allegations of the foregoing paragraphs of this Complaint as though fully set forth herein.

37. By knowingly claiming in false and malicious takedown notices communicated to Amazon, one of Benson Mills' most crucial selling partners, that various Benson Mills' products

1 are infringements of purported copyrights owned by Defendants, with the intent to harm Benson
2 Mills thereby, Defendants have perpetrated the tort of unfair competition in violation of
3 Washington State common law.

4 38. As a direct and proximate result of Defendants' communications of such false and
5 malicious takedown notices, Benson Mills has suffered and will continue to suffer damages,
6 including the loss of profits Benson Mills would have earned while its product listings were
7 suspended by Amazon based on Defendants' false takedown notices. Benson Mills should be
8 awarded such damages in order to compensate it for such a loss of profits.
9

10 39. In addition, in order to prevent the recurrence of such harm in the future, which
11 cannot be fully remedied through an award of monetary relief and is therefore irreparable,
12 Benson Mills is entitled to the entry of a permanent injunction against Defendants and all those
13 acting in concert with them, preventing them from filing any future false and fraudulent
14 takedown notices that contain groundless allegations of copyright infringement on the part of
15 Benson Mills with respect to any Benson Mills products.
16

17 **DEMAND FOR RELIEF**

18 WHEREFORE, Benson Mills respectfully requests entry of a judgment granting relief
19 against Defendants as follows:

20 1. Damages in an amount to be proven at trial, with interest to the extent available at
21 law;
22

23 2. Preliminarily and permanently enjoining Defendants, their agents, servants,
24 companies, affiliates, employees and attorneys, and those persons in active concert or
25 participation with them, or any of them, from filing further false and fraudulent DMCA

3. Awarding Benson Mills prejudgment interest according to law;
4. Awarding Benson Mills punitive damages according to law;
5. Awarding Benson Mills its reasonable attorney's fees and costs; and
6. Granting Benson Mills such other and further relief as this Court may deem just and proper.

Benson Mills hereby demands a trial by jury pursuant to Fed. R. Civ. P. 38 on all claims and defenses so triable.

s/ Erin Kolter
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